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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDDIE JAMES LEWIS et al., Defendants and Appellants.	E035918 / E036214 (Super.Ct.No. RIF 105632) OPINION

APPEAL from the Superior Court of Riverside County. Carl E. Davis, Judge. (Retired judge of the San Bernardino Superior Court, assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed with directions.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Michael A. Washington.

Terrence Version Scott, under appointment by the Court of Appeal, for Defendant and Appellant Eddie James Lewis.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, and Angela M. Borzachillo, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction

Based on defendants Eddie James Lewis's and Michael Andrew Washington's participation in two separate drive-by shootings, a jury found them guilty of three counts of attempted murder (counts 1 to 3) (Pen. Code, §§ 664, 187, subd. (a))[1] and one count of discharging a firearm from a motor vehicle (count 4) (§ 12034, subd. (c)). The jury also found Washington guilty of being a felon in possession of a firearm (count 5). (§ 12021, subd. (a)(1).) The jury found true the special allegation that the attempted murders were willful, deliberate, and premeditated. The jury also found true the following enhancement allegations: each of the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); in counts 1 and 2, the principal intentionally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)); and, in counts 3 and 4, Washington personally and Lewis vicariously discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)(1)). Lewis admitted that he had two prior serious or violent felonies, one of which also qualified as a strike. (§ 667, subds. (a), (c)-(e)(2)(A).) The trial court sentenced Lewis to a total determinate sentence of 47 years plus an

[1] All further statutory references will be to the Penal Code unless otherwise stated.

indeterminate sentence of 155 years to life. The court sentenced Washington to a total determinate sentence of 73 years, an indeterminate sentence of three consecutive life sentences, plus an additional term of 25 years to life.

Defendants raise several claims on appeal, each joining in the other's arguments to the extent appropriate: Lewis argues that the court erred in denying his *Batson/Wheeler*[2] motions based on the prosecutor's inappropriate use of his peremptory challenges; Lewis argues that he should not have been convicted under section 12034, subdivision (c), as a matter of law; both Washington and Lewis raise challenges concerning the court's rulings as to the scope of the gang expert's testimony; Washington argues that the court also erred in excluding expert evidence regarding gun cartridges; Lewis argues that the court improperly designated count 4 as the principal term; both Washington and Lewis argue that the court inappropriately applied the gang enhancements under section 186.22; Lewis argues that the court should have stayed sentence in count 4 under section 654; Lewis argues that the court erred in imposing the full term for the firearm enhancements under section 12022.53, subdivision (d); and Washington points out a few errors in the abstract of judgment.

Although we reject most of the above arguments, we agree with defendants that the court erred in imposing the 10-year gang enhancements under section 186.22. We

[2] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

also agree that the court must correct certain clerical errors in the abstract of judgment. In all other respects, we affirm the judgment.

2. Factual History

Shortly before 11:00 p.m. on September 6, 2002, Maria Maldonado and her boyfriend, Nelson Sanchez, were sitting on the front porch of her home at 3590 Dwight Street in Riverside. A car, which was initially described as a BMW, stopped in front of the home and the passenger exited the car. The passenger was a young, thin, black male wearing a green Hawaiian shirt.[3] The man asked them where they were from and then yelled, "12th Block Crip Niggers." He opened fire on the couple, who took cover inside the house. Maldonado identified Washington as the shooter. Washington returned to the car and the driver, another black male, drove off.

A few hours later, about 2:00 a.m. on September 7, 2002, Christian Flores was drinking beer and socializing with his friends in front of his home at 2858 11th Street. A car rolled up to the house. The car was described as a square-shaped car like an old Volvo. Flores heard someone shout and then he heard gunshots. Flores dove to the ground and was hit on the heel of his right foot. One of Flores's friends, Judas Rocca, took out his nine-millimeter pistol and returned fire. After Rocca fired some shots, the car took off.

[3] While Maldonado may have been mistaken about the color of the shirt because of the lighting, she testified that Washington's Hawaiian shirt was the same shirt worn by the shooter.

At the same time, Officer David Castaneda heard gunshots and drove south on Victoria toward 11th Street, where he saw a car speeding eastbound. He followed the car and activated his lights and sirens. As he approached the car, Castaneda noticed that the rear window had been shot out. Instead of stopping, the car turned right on 14th Street. At the intersection of 14th Street and Bermuda, the passenger exited the vehicle and fled on foot. Castaneda radioed for help and reported the license plate of the car. Castaneda pursued the passenger on foot but was unable to keep up. Officers Daniel Russell and Juan Munoz continued the chase and eventually apprehended the man, who was Washington.

The registered owner of the car, a 1982 Mercedes-Benz, lived at 4557 Sedgwick. At 2:18 a.m., Officer David Riedeman went to that location and found the Mercedes under a cover on the lawn. Dispatch informed Riedeman that the police helicopter's heat sensor detected that the car under the cover was still warm. Riedeman ordered the occupants to exit the house. Lewis and his parents complied. Lewis told Riedeman that he was the only one who had driven the Mercedes in the last 24 hours. He also identified himself as a member of the 1200 Block Crips. Karen Lewis informed the police that her son had just driven home about 10 to 15 minutes earlier and that his rear window had been shot out.

Maldonado identified the Mercedes as the car involved in the shooting at her house. Casteneda also identified the Mercedes as the one he had been pursuing. Inside the car, officers found a nine-millimeter bullet casing on the floorboard behind the front

passenger seat. Gunshot residue analysis indicated that a firearm was discharged in close proximity to the front passenger seat.

Criminalist James Hall concluded that the shell casings from both the Dwight Street residence and the 11th Street residence were from the same weapon. An additional five or six casings from the 11th Street residence were fired from a different weapon.

3. *Batson/Wheeler* Motion

Lewis claims the trial court erred in denying his *Batson/Wheeler* motions when the prosecutor exercised his peremptory challenges against potential African-American jurors. Lewis specifically argues that the court applied the wrong standard in relying solely on the prosecutor's subjective good faith.

Generally, the federal and state Constitutions prohibit the exercise of peremptory challenges to exclude prospective jurors based on their race. (*Batson, supra,* 476 U.S. at p. 89; and *Wheeler, supra,* 22 Cal.3d at pp. 276-277.) The use of a peremptory challenge is presumed to be constitutional. (*People v. Reynoso* (2003) 31 Cal.4th 903, 914; *People v. Crittenden* (1994) 9 Cal.4th 83, 114.) The presumption, however, is rebutted when a party exercises its peremptory challenge based on group bias—i.e., a bias relating to a cognizable group, distinguishable based on such considerations as race, ethnicity, and religion—as opposed to a specific bias—i.e., a bias relating to a specific party, witness, or case on trial. (*Wheeler, supra,* at pp. 276-277; see also *Crittenden, supra,* at p. 115.)

When a criminal defendant objects to the prosecution's use of its peremptory challenges, he bears the initial burden of establishing a prima facie case that the jurors have been excluded on the basis of group bias. (*Hernandez v. New York* (1991) 500 U.S.

352, 358; *Reynoso, supra*, 31 Cal.4th at p. 914.) If the court finds a prima facie case, the burden shifts to the prosecutor to provide a race or group-neutral explanation. (*Hernandez, supra*, at pp. 358-359; *People v. Arias* (1996) 13 Cal.4th 92, 135.) "The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race or group-neutral explanation related to the particular case being tried. [Citations.] The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice. [Citation.]" (*Arias, supra*, at p. 136.)

The prosecutor must convince the court that his race-neutral explanations are credible. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) Because the question turns on the prosecutor's credibility, reviewing courts must afford great deference to the trial court's determination. (*People v. Box* (2000) 23 Cal.4th 1153, 1188.)

Defendant suggests that the court's role in evaluating the prosecution's explanations involves more than determining his or her credibility. In citing *Collins v. Rice* (9th Cir. 2003) 348 F.3d 1082, defendant argues that the court should determine whether the prosecution's justifications are objectively reasonable. While the court in *Collins* uses the term "objectively unreasonable" to describe the prosecutor's statements, the Ninth Circuit criticism was that the trial court inappropriately found the prosecutor's justifications were credible despite clear facts to the contrary. (*Id*. at pp. 1094-1096.) The existence of facts in the record that were objectively contrary to the prosecutor's

justifications, therefore, indicated the lack of credibility and the possibility of pretext. (*Id*. at p. 1095.) The relevant inquiry remained the same, namely, whether the prosecutor's justifications were credible. (*Id*. at p. 1096.)

Here, there were no facts in the record to suggest a lack of credibility or the possibility of pretext. The defense made a series of *Batson/Wheeler* motions. In responding to the motions, the prosecutor provided a race-neutral explanation for each peremptory challenge. In regards to prospective juror Hara, the prosecutor cited Hara's hostile body language and inappropriate attire. The prosecutor explained that prospective jurors Flowers and Drake had significant contacts with law enforcement. Flowers had family members who were convicts and Drake's cousin had been killed by a police officer. Even without a motion, the prosecutor offered an explanation for excusing prospective juror Poleewicker. The prosecutor noted that Poleewicker's son had been prosecuted by the Riverside County District Attorney. When a motion was made in regards to potential juror Allen, the prosecutor explained that Allen had been a victim of a Mexican gang robbery and was not paying attention in court. Defendant made his last *Batson/Wheeler* motion when the prosecution requested the excusal of potential juror Trice. In response, the prosecutor explained that in a prior criminal prosecution, Trice was a minority juror on a hung jury. After each explanation, the court found that the prosecutor exercised his peremptory challenges in a manner suggesting subjective good faith.

The court's finding of good faith is entirely consistent with both state and federal law. Peremptory challenges are distinguished from challenges for cause in that they can

be used for any reason, so long as the reason is not discrimination on the basis of group bias. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122.) Valid reasons can be as significant as prior negative contact with law enforcement or as trivial and subjective as disapproval of the potential juror's "body language" or appearance. (See, e.g., *People v. Ward* (2005) 36 Cal.4th 186, 202; *People v. Panah* (2005) 35 Cal.4th 395, 442.) The role of the court is to determine only whether the proffered reasons are credible. (*People v. Gray* (2005) 37 Cal.4th 168, 188-189; *Miller-El v. Dretke* (2005) __ U.S. __, __ [125 S.Ct. 2317, 2331-2332].) There is no basis for suggesting that the prosecution's explanations in this case were not credible. Most of the jurors were excused because of prior negative contact with law enforcement either by the jurors themselves or someone close to them. The other jurors also were excused for valid, nondiscriminatory reasons.

We conclude the trial court properly rejected defendants' allegations of discrimination by the prosecutor in the use of his peremptory challenges.

4. Section 12034

Defendant Lewis argues that subdivision (b) of section 12034 specifically governs the driver's liability and, therefore, bars the prosecution of the driver for aiding and abetting a passenger in violating subdivision (c) of the same statute. Because Lewis's conduct also constituted a violation of the offense charged in subdivision (c), he was properly charged and convicted.

Section 12034 provides, in relevant part:

"(b) Any driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly permits any other person to discharge any firearm

from the vehicle is punishable by imprisonment in the county jail for not more than one year or in state prison for 16 months or two or three years.

"(c) Any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony punishable by imprisonment in state prison for three, five, or seven years."

Defendant attempts to apply the "special over general" rule to argue that the prosecution can charge a driver with only a violation of subdivision (b). This rule applies, however, only where the two provisions are incompatible. "The rule does not apply . . . unless 'each element of the "general" statute corresponds to an element on the face of the "specific" [*sic*] statute' or 'it appears from the entire context that a violation of the "special" statute will necessarily or commonly result in a violation of the "general" statute.' [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 154, citing *People v. Jenkins* (1980) 28 Cal.3d 494, 502.) "If general and specific statutes dealing with the same subject are inconsistent, the specific will prevail over the general. [Citations.] But if the two statutes can be harmonized, they are given concurrent effect." (*People v. Betts* (2005) 34 Cal.4th 1039, 1058.)

Based on the statutory language, the two provisions are not inconsistent. While both involve the discharge of a firearm from a vehicle, the subdivisions (b) and (c) describe two entirely different crimes with different actus reus and mens rea components. Subdivision (b) is violated when one knowingly permits another person to discharge a firearm from the vehicle. Subdivision (c) is violated when one willfully and maliciously discharges a firearm. A violation of subdivision (b) does not necessarily or commonly

result in a violation of subdivision (c). Where the defendant's conduct falls under both provisions and the provisions do not conflict, the prosecutor has every right to elect to proceed under either provision. (*People v. Cockburn* (2003) 109 Cal.App.4th 1151, 1157.)

Based on Lewis's argument, a person who discharges a firearm while driving a vehicle could claim that he should be liable under only subdivision (b). Clearly this is not what the Legislature intended. Subdivision (b) allows the prosecution of the driver, where his conduct may not otherwise be subject to criminal liability. A person is generally not liable for the failure to act unless he has a duty to act. An affirmative duty to act may be imposed by statute. (*People v. Heitzman* (1994) 9 Cal.4th 189, 197-198.) That is exactly what the Legislature did in including subdivision (b). "The statute itself defines the class of persons who have a duty to act: drivers and owners of vehicles. It therefore imposes a legal duty on such drivers and owners to prevent the discharge of firearms from their vehicles." (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1467; see also *In re Ramon A.* (1995) 40 Cal.App.4th 935, 941.)

Contrary to Lewis's argument, the different crimes listed in section 12034 provide alternative ways to ensure that each participant in a drive-by shooting is held responsible in accordance with his participation and culpability. "Obviously, a driver or owner can be held criminally liable for affirmatively assenting to, or authorizing the discharge; but he or she can also be held criminally liable for failing to prevent the discharge (provided, of course, he or she had the power or ability to prevent it)." (*Laster*, *supra*, 52 Cal.App.4th at p. 1467.)

In aiding and abetting Washington in discharging a firearm from the vehicle, Lewis was properly charged and convicted under section 12034, subdivision (c).

5. Expert Testimony

Both defendants challenge the court's rulings on the admission of expert testimony. Lewis argues that the court erred in admitting expert testimony on gang rivalry because the victims in this case were not gang members. Washington argues that the court erred in allowing the gang expert to provide an opinion as to the ultimate facts. Washington also argues that the court violated his constitutional rights in excluding defense evidence concerning the firearm cartridges.

Well-settled rules govern our analysis. Under Evidence Code section 720, subdivision (a), "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Also, under Evidence Code section 801, a witness may provide expert opinion relating to a subject that is sufficiently beyond common experience such that the testimony would assist the trier of fact. (See also *People v. Williams* (1997) 16 Cal.4th 153, 195; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651.)

Particularly, as relevant to the gang expert testimony, courts have held that the culture and habits of criminal street gangs often present a subject matter that is beyond common experience. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 438-439; *Williams, supra,* 16 Cal.4th at pp. 195-196; *People v. Gardeley* (1997) 14 Cal.4th 605, 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506-609; *People v. Olguin* (1994) 31 Cal.App.4th

1355, 1370-1371.) Permissible testimony on the culture and habits of criminal street gangs include "testimony about the size, composition or existence of a gang [citations], gang turf or territory [citations], an individual defendant's membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether and how a crime was committed to benefit or promote a gang [citations], rivalries between gangs [citation], gang-related tattoos, gang graffiti and hand signs [citations], and gang colors or attire [citations]." (*Killebrew, supra*, 103 Cal.App.4th at p. 657 [fns. omitted].)

The trial court exercises broad discretion in determining the admissibility of expert testimony, and its ruling will not be disturbed on appeal absent a manifest abuse of discretion. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207.)

A. Gang Rivalry

Lewis argues that the trial court erred in allowing Detective Terry Redfearn to testify at length concerning the rivalry between two street gangs that claimed territory in east Riverside, namely, the African American street gang, the 1200 Block Crips, and the Hispanic street gang, Eastside Riva. Both Lewis and Washington were members of the 1200 Block Crips. Because none of the victims were members of Eastside Riva, Lewis argues that the court should not have allowed Redfearn to testify concerning Eastside Riva's gang activities.

Defendant's argument lacks merit. Regardless of whether the victims were members of the Eastside Riva gang, the evidence was highly relevant to prove Lewis's and Washington's motive for committing the drive-by shootings. Evidence is relevant if

it has any tendency in reason to prove a material fact, such as motive. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.) "'[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.' [Citations.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)

Motive may be established by evidence of gang rivalry and gang activity. "Cases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent. [Citations.]" (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518, and cases cited therein.)

Here, Detective Redfearn's testimony provided support for the prosecution's theory that Lewis and Washington's motive for the shootings was to drive through east Riverside to find and assault Hispanics. Redfearn explained that both the 1200 Block Crips and Eastside Riva claimed the same territory in east Riverside. Both gangs aim to exclude other gangs from the area. Eastside Riva accomplishes this goal primarily by assaulting members of other gangs with firearms. Redfearn testified concerning the violent rivalry between the two gangs. The rivalry began in 1991, when a group of both Blacks and Hispanics shot and killed a Hispanic gang member. After the murder, the Mexican Mafia, a prison gang, ordered members of Eastside Riva to retaliate by shooting Blacks. In 2002, Eastside Riva shot and killed Anthony Sweat, who previously had not been identified as a member of the Crips but was wearing gang colors. During a drive-by shooting later that same year, Eastside Riva shot and killed Marquis Lancaster. The 1200 Block Crips also engaged in similar activity.

Detective Redfearn explained that the drive-by shootings in this case were committed for the benefit of the 1200 Block Crips. As stated above, Lewis and Washington were members of the 1200 Block Crips gang. During the Dwight Street incident, one of the defendants even yelled out "1200 Block Crip Nigger" before firing at the victims. Both incidents involved Hispanic victims. In Redfearn's opinion, the shootings were executed in retaliation for the previous acts of violence against Blacks.

Detective Redfearn's testimony was highly probative in establishing motive. The evidence was particularly relevant in this case where the victims were not members of a rival gang. Without his discussion of the rivalry between the two gangs, the jury would have been left with evidence of Black gang members shooting at Hispanics with whom they had no prior relationship and for no apparent reason.

Detective Redfearn's testimony focused primarily on the activity of the 1200 Block Crips gang and did not delve unnecessarily into the activity of the Hispanic gangs. Redfearn discussed Eastside Riva and the Mexican Mafia to describe the ongoing rivalry between the Black and Hispanic gangs. Redfearn spoke briefly about the Mexican Mafia and only to explain its influence on Eastside Riva's violence toward Blacks. While gang evidence tends to be inflammatory, the evidence in this case was not unduly prejudicial and any prejudice was outweighed by its probative value. (See *Williams, supra,* 16 Cal.4th at p. 193.)

Because the prosecution's theory was that Lewis and Washington shot at the victims in this case in retaliation for Eastside Riva's previous acts of violence, this evidence was directly relevant to establishing motive for the crimes and proving the truth

of the gang enhancement allegations. Although Lewis argues that the prosecution relied on speculative inferences that Lewis and Washington were aware of the prior Eastside Riva shootings, such inferences were not speculative, but reasonably could have been drawn from Detective Redfearn's testimony. Redfearn's testimony concerning the ongoing rivalry between the two gangs, the fact that the 1200 Block Crips commonly engaged in firearm assaults, and the fact that the shootings occurred around the time of Eastside Riva's violent assaults against Blacks, was instrumental in the jury resolving key issues in this case.

We conclude that the trial court properly allowed Detective Redfearn to testify concerning the Eastside Riva and Mexican Mafia gangs.

B. Ultimate Facts

Washington argues that the gang expert exceeded the scope of proper expert testimony by providing an opinion on the ultimate fact of whether the offenses were committed for the benefit of the 1200 Block Crips gang. Washington also argues that the expert should not have been allowed to testify that the 11th Street shooting was committed in retaliation for prior acts of violence perpetrated against the 1200 Block Crips and that it was not committed in self-defense.

As noted by defendant, there is no general rule against the admission of expert opinions that embrace the ultimate facts to be determined by the jury. (§ 805; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507.) The expert may not provide a statement, however, that simply expresses his general belief as to how the jury should decide the case. (*Killebrew, supra,* 103 Cal.App.4th at p. 651.) In relying on the *Killebrew* case,

defendant argues that the expert's testimony in this case amounted to an expression of his opinion that the gang enhancements were true. We disagree.

In *Killebrew*, the gang expert testified that when a gang member in a car possesses a gun, every other gang member in the car knows about the gun and has constructive possession of it. The court held that the expert's testimony went beyond the permissible scope of expert opinion when he testified concerning a gang member's subjective knowledge and intent. (*Killebrew, supra*, 103 Cal.App.4th at p. 658.) The *Killebrew* court noted that while other courts have allowed expert testimony on a gang's collective expectations, courts have not permitted testimony on an individual's specific knowledge. (*Ibid*.) The expert's opinion in *Killebrew* was held to be of ". . . the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided. It was improper opinion on the ultimate issue and should have been excluded. [Citation.]" (*Ibid*.)

Other courts, including those evaluated in *Killebrew*, have found that such testimony falls within the permissible scope of opinion testimony on criminal street gangs. In *Gardeley, supra*, 14 Cal.4th 605, the gang expert responded to a hypothetical question by stating that the conduct involved in the case could be described as "gang-related activity." Based on the expert's response, the jurors could conclude that the defendants committed the acts for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist the gang. (*Id*. at p. 619.) Moreover, other courts also have admitted direct expert opinion on ". . . whether and how a crime was committed to benefit or promote a gang. . . ." (*Killebrew,*

supra, 103 Cal.App.4th at p. 657, citing *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 204; *People v. Akins* (1997) 56 Cal.App.4th 331, 336; see also *Valdez, supra,* 58 Cal.App.4th at p. 509.)

In *Gonzalez, supra,* 126 Cal.App.4th 1539, the court specifically drew a distinction between testimony concerning a particular defendant's knowledge and testimony concerning a group's motivation for committing certain crimes. "The People are entitled to 'introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.' [Citation.] [¶] Expert testimony repeatedly has been offered to show the 'motivation for a particular crime, generally retaliation or intimidation' and 'whether and how a crime was committed to benefit or promote a gang.' [Citations.]" (*Id.* at p. 1550.)

Based on the parameters delineated by the cases above, Detective Redfearn's testimony fell within the proper scope of expert testimony. Unlike the expert in *Killebrew*, Detective Redfearn did not testify concerning a particular individual's knowledge or intent. Redfearn instead testified that the offenses were gang-related or, more specifically, that the crimes were committed for the benefit of the 1200 Block Crips gang. As discussed above, Redfearn also testified concerning the gang rivalry between the Eastside Riva and the 1200 Block Crips. Specifically, Redfearn testified the shootings were executed in retaliation for prior acts of violence by the Eastside Riva gang. The trial court committed no error in allowing Detective Redfearn to testify concerning these matters.

As to Detective Redfearn's testimony on self-defense, the record shows that he simply responded to whether he had any information that defendants shot at the victims in self-defense and, particularly, whether there was evidence that "somebody shot at them first." Redfearn indicated that there was no evidence of self-defense. Defendants raised no objection. In any event, Redfearn's testimony consisted of a factual statement not a legal conclusion. Also, the admission of Redfearn's response was clearly harmless because other evidence established that the attacks were not provoked and, accordingly, there was nothing in the record to support that the crimes were committed in self-defense.

We conclude that defendants have failed to show any error with regard to the gang expert's testimony.

C. Primer-Less Cartridges

Washington also raises a claim of evidentiary error with regard to casings found at the scene of the 11th Street shooting. The firearms expert, James Hall, testified that there were 11 casings found at the 11th Street shooting. Five silver casings were fired from the same weapon used during the Dwight Street shooting. Five of the brass casings came from the same source, but from a different weapon than the one used during the Dwight Street shooting. One of the brass casings, along with the casing found in the Mercedes, was missing its primer. Hall testified that, even without the primer, he was able to conclude that both casings were cycled through the same weapon.

Toward the end of the prosecution's case, Washington's trial counsel asked to present expert testimony challenging Hall's findings, particularly the finding concerning the casings without primers. The defense expert would testify that there was no basis for

concluding from which weapon the casings without primers were discharged. The expert also would testify that, if the casings had been used, they would have jammed inside the gun.

The prosecutor objected on the ground that the defense motion was untimely. The trial court agreed with the prosecutor that defense counsel should not be entitled to introduce an expert witness at this late stage in the proceedings.

Defendant claims that the trial court deprived him of his constitutional right to present a defense in denying his request to offer expert testimony concerning the casings without primers. Defendant's argument lacks merit. While a criminal defendant may have a constitutional right to offer testimony in his defense, he has no right to demand the admission of minor and marginally relevant evidence, particularly when such evidence is offered in an untimely manner.

Under the due process clause and the compulsory process clause, a criminal defendant generally has the right to offer witnesses in his defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *People v. San Nicolas* (2004) 34 Cal.4th 614, 662.) The exclusion of evidence on a minor or subsidiary point, however, does not affect a criminal defendant's right to present a defense. (*People v. Harris* (2005) 37 Cal.4th 310, 353.)

Despite defendant's claim that the evidence was vital to his defense, his argument lacks merit. Defendant argues that the proposed evidence would have cast doubt on the People's expert witness as to the identification of the casings and their connection to the weapons used during the shootings. This broad statement finds no support in the record.

Defendant's trial counsel offered testimony challenging Hall's conclusion that the two casings without primers were fired from the same weapon. It is pure speculation to assume that such evidence would have cast doubt on Hall's entire trial testimony. Nothing in the record suggested that Hall's other conclusions were questionable. The expert testimony was not being offered to challenge Hall's earlier conclusions. In particular, the evidence would not have challenged Hall's finding that five of the casings found at the Dwight Street shooting and five of the casings found at the 11th Street shooting were fired from the same weapon. Witnesses identified Washington as the shooter and, therefore, these findings were vital to Washington's defense. The other findings were of minimal significance to Washington's defense. The two casings without primers involved the other weapon used by one of the victim's companions, who returned fire. The exclusion of such minor evidence did not impair defendant's constitutional right to present a defense. (See *People v. Maury* (2003) 30 Cal.4th 342, 414.)

We also note that both defense attorneys thoroughly cross-examined Hall on his findings concerning the casings without primers. They questioned Hall's reliance on certain distinctive marks, his degree of certainty concerning his findings, and even his partiality. Defendants therefore were afforded an opportunity to challenge Hall's testimony concerning this evidence.

Moreover, as noted by the People, defendant's request was untimely. The motion was made toward the end of the prosecution's case, while the prosecutor was presenting his last witness. "A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice. [Citations.]" (*People v.*

Cox (1991) 53 Cal.3d 618, 700; see also § 1044.) As defendant admits, he had received discovery concerning Hall's testimony. While he may not have anticipated Hall's findings regarding the casings without primers, this evidence was not critical to his defense. Under these circumstances, the court's denial of defendant's untimely request was a proper exercise of its inherent power to ensure the efficacious administration of justice.

For these reasons, we conclude that the trial court's ruling did not violate defendant's constitutional right to present a defense.

6. Sentencing Errors

Both defendants claim that the trial court made a number of sentencing errors.

There are two main types of sentencing errors. The trial court makes an error of law when it violates the mandatory provisions of a sentencing statute. Such errors result in an unauthorized sentence, which is subject to correction on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.)

The second type of error occurs when the trial court abuses its sentencing discretion. Such errors are reviewed under the deferential abuse of discretion standard. Under that standard, a ruling may be overturned only upon a clear showing that the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

A. Principal Term

Defendant Lewis argues that the court violated section 1170.1, subdivision (a), by designating count 4 as the principal term. Defendant notes that his sentence of 32 years

to life in count 4 was far less than his sentence of 70 years to life in count 3, 65 years to life in count 1, and even less than his sentence of 35 years to life in count 2. Lewis argues that the trial court erred in designating the shortest sentence as the principal term.

Section 1170.1, subdivision (a), provides that the greatest term of imprisonment should be designated as the principal term. As noted by the People, however, the rule in section 1170.1 applies to determinate sentences. "Under the [Determinate Sentencing Act], if a defendant is convicted of more than one offense carrying a determinate term, and the trial court imposes consecutive sentences, the term with the longest sentence is the 'principal term'; any term consecutive to the principal term is a 'subordinate term.' [Citation.]" (*People v. Felix* (2000) 22 Cal.4th 651, 655; *People v. Reyes* (1989) 212 Cal.App.3d 852, 856.)

Section 1170.1 does not apply to indeterminate sentences. "[W]hen indeterminate terms are imposed consecutively, as was done here, section 1170 does not apply. Instead, the sentencing is controlled by sections 1168, subdivision (b), and 669, as well as California Rules of Court, rule 451(a). When the three are read together, the legislative intent to treat and compute determinate and indeterminate terms separately is plain. [Citations.] . . . A basic parameter is that there is no provision for making a determinate term either principal or subordinate to an indeterminate term. [Citations.] Consequently, section 1170.1 is inapplicable by its own terms because it applies only to consecutive sentences imposed under section 1170." (*People v. Lyons* (1999) 72 Cal.App.4th 1224, 1228; see also *People v. Garza* (2003) 107 Cal.App.4th 1081, 1094; *People v. McGahuey* (1981) 121 Cal.App.3d 524, 531.)

In this case, because the court imposed indeterminate life sentences to run consecutive to a determinate sentence, it was not required to designate a principal term under section 1170.1. The sentence reduction rules that pertain to determinate sentences have no application to indeterminate sentences. While the determinate sentence must be served first, neither the determinate or indeterminate sentence is principal or subordinate to the other. They must be considered and calculated independently. (*Garza, supra*, 107 Cal.App.4th at p. 1094.)

We conclude that, because the court imposed an indeterminate life sentence in count 3, the court was not required to designate that sentence as the principal term. In fact, the court had no obligation to designate any of the sentences as principal or subordinate under the Determinate Sentencing Act.

B. Tripling Parole Eligibility

Lewis also claims the trial court erred in tripling the minimum parole eligibility term in counts 1 through 3. In all three counts, the trial court imposed a sentence of 15 years to life under section 186.22, subdivision (b). In counts 1 and 3, the court also tripled the sentence of 15 years to impose a total sentence of 45 years to life under section 667, subdivision (e)(2)(A)(1), of the "Three Strikes" law. In support of his claim that the court erred in tripling his sentence, defendant relies on *People v. Ortiz* (1997) 57 Cal.App.4th 480.

In *Ortiz*, the court addressed the question of whether a determinate sentence can be added to the minimum parole eligibility period of an indeterminate sentence under section 186.22, subdivision (b). The court held that, because section 186.22, subdivision

(b)(1), which provided for a one-, two-, or three-year enhancement, specifically exempted defendants who were given life sentences, the additional determinate term could not be added to the minimum parole eligibility period. (*Ortiz, supra*, 57 Cal.App.4th at p. 486.) The question in *Ortiz* bears no resemblance to the issue here.

In this case, the question is whether a minimum parole eligibility period can be tripled under the "Three Strikes" law. Both the California Supreme Court and this court have answered this question in the affirmative. (See *People v. Acosta* (2002) 29 Cal.4th 105, 114; *People v. Jefferson* (1999) 21 Cal.4th 86, 90, 102; *People v. Mendoza* (2000) 78 Cal.App.4th 918, 921.) In *Mendoza*, we explained: "We are not persuaded by defendant's argument that the use of the word 'period' in option (iii) in describing the punishment under section 190 indicates the intent of the Legislature to use only that word in describing indeterminate sentences. Indeed, the word 'term' used in option (i) is also used in several other provisions of the statute to refer to both determinate and indeterminate terms. (See, e.g., § 667, subd. (e)(1) & (2)(A).) Recently, the California Supreme Court held that subdivision (e)(1), which uses the word 'term,' permits the trial court to sentence second strike criminal defendants, whose punishment would otherwise be an indeterminate term, by doubling their minimum parole eligibility date. [Citation.] Since subdivision (e)(1) is worded almost identically to subdivision (e)(2)(A) and deals with the same subject matter, the rules of statutory construction require us to interpret both subdivisions in a similar manner. [Citation.]" (*Mendoza, supra*, at p. 929.)

Accordingly, the court in this case properly applied section 667, subdivision (e)(2)(A), to triple the minimum parole eligibility period.

C. 10-year Gang Enhancements

Both Lewis and Washington claim the trial court erred in imposing a 10-year gang enhancement for each of counts 1, 2, and 3 under section 186.22, subdivision (b). The People agree.

Section 186.22, subdivision (b)(1)(C), authorizes the imposition of a 10-year enhancement for a violent felony. Section 186.22, subdivision (b)(5), specifically provides that the enhancement does not apply where the violent felony is punishable by an indeterminate life sentence. The California Supreme Court has held that the language in this provision is plain and unambiguous and, therefore, precludes the imposition of a 10-year term under the stated circumstances. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006-1007, 1011.)

We conclude that the trial court erred in imposing an additional term of 10 years in counts 1, 2, and 3, under section 186.22, subdivision (b).

D. Section 654

Lewis claims the trial court should have stayed sentence in count 4 under section 654.

Subdivision (a) of section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Section 654 applies not only to the same criminal act, but also to an indivisible course of conduct committed pursuant to the same criminal intent or objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209, citing *Neal v. State of California* (1960) 55 Cal.2d 11; see also *People v. Perez* (1979) 23 Cal.3d 545, 551.) "'"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."' [Citation.]" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1084.)

The statute does not bar multiple punishment when the defendant commits a violent offense involving multiple victims. ". . . 'The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person. This distinction between an act of violence against the person that violates more than one statute and such an act that harms more than one person is well settled. Section 654 is not ". . . applicable where . . . one act has two results each of which is an act of violence against the person of a separate

individual." [Citations.]' [Citation.]" (*People v. Oates* (2004) 32 Cal.4th 1048, 1063, quoting *Neal v. State of California*, *supra*, 55 Cal.2d at pp. 20-21.)

Defendant's reliance on *People v. Kane* (1985) 165 Cal.App.3d 480, is unavailing. There, the defendant discharged his firearm into a vehicle occupied by the sole victim. The court, therefore, held that the crime of possessing a firearm and firing the firearm at the victim constituted an indivisible course of conduct. (*Id*. at p. 488; but see *People v. Alvarez* (1992) 9 Cal.App.4th 121, 128.)

In this case, defendant was convicted of the attempted murder of Christian Flores (count 3) and discharging a firearm from a motor vehicle at another person (count 4). While both offenses involved the same 11th Street incident, the offense charged in count 4 did not specify Christian Flores as the victim. During the 11th Street incident, Christian Flores was standing outside his home socializing with about six of his friends. When Lewis and Washington drove up to the house and started shooting, the evidence did not indicate that they were shooting at any particular individual. In fact, the gang expert's testimony suggested that they were targeting all Hispanics. Flores testified that he heard the "bullets just flying all over the place." Based on the evidence presented at trial, the court reasonably could have found that the crime charged in count 4 involved multiple victims. The court, therefore, was not required to stay sentence in count 4 under section 654.

E. Firearm Enhancements

In addition to joining in Lewis's argument that the court erred in imposing the gang enhancements, defendant Washington also argues that the court erred in imposing

full 20-year enhancements under section 12022.53, subdivision (c) in counts 1 and 2.

As stated above, the Determinate Sentencing law, including sections 1170.1 and 1170.11, which authorize the imposition of one-third the middle term for all subordinate terms, does not apply to indeterminate sentences. (*Lyon, supra,* 72 Cal.App.4th at p. 1228.) The same is true for the enhancement added to the indeterminate term. (See *Felix, supra*, 22 Cal.4th at p. 656; see also *Garza, supra*, 107 Cal.App.4th at p. 1094.) The court correctly imposed the full terms. (See *Felix, supra*, at p. 656.)

7. Abstract of Judgment

Washington has brought to our attention a few errors in the abstract of judgment that require correction.

Appellate courts may correct clerical errors in the record at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) "An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]" (*Ibid.*)

Three errors are apparent from the record of Washington's sentencing hearing. First, the court imposed and stayed a seven-year term in count 4, but the abstract indicates that the sentence was ordered to run concurrently. The abstract must be corrected to show that the sentence in count 4 was stayed.

Second, according to the abstract, Washington was sentenced pursuant to the Three Strikes law, particularly, section 667, subd. (e)(2)(A). While the Information alleged prior strikes against defendant Lewis, there were no prior strikes alleged against defendant Washington. This reference to the Three Strikes law must be deleted.

Lastly, the abstract summarizes Washington's sentence as "73 years plus 3 consective [*sic*] life terms plus 25 years to life." This summary suggests that defendant was sentenced to a determinate term of 73 years in addition to the three-year term imposed in count 5. After striking the 10-year gang enhancements, the corrected abstract should reflect that the court imposed an aggregate determinate term of 43 years (substantive charge in count 5 plus firearm enhancements in counts 1 and 2), three indeterminate life sentences (substantive charges in counts 1, 2, and 3), plus an additional indeterminate term of 25 years to life (firearm enhancements in count 3).

8. Disposition

We remand this case and direct the trial court to correct both Lewis's and Washington's abstract of judgment by striking the 10-year gang enhancements as to counts 1, 2, and 3. We also direct the court to make the following additional corrections to Washington's abstract of judgment: the sentence in count 4 is stayed; delete reference to the Three Strikes law; and provide an accurate summary of defendant's determinate and indeterminate sentences (43 years, plus three life sentences, plus 25 years to life). In all other respects, we affirm Lewis's and Washington's judgments.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.